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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WILLIAM J. BUTTERFIELD, PLAINTIFF IN ERROR,
v.
GEORGE R. BIDWELL. } No. 296.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.



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This is one of the actions instituted to test the constitutionality of the Tea Inspection Act of 1897. Defendant was collector of the port of New York. Except as to the form of action, the case presented is quite similar to that in *Buttfield* v. *Stranahan*, No. 294 of this term. The action was tried before Judge Coxe, sitting with a jury, on October 22, 1902. A verdict was directed for the defendant, and (as the case involved a constitutional question) a writ of error was taken directly to this court.

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STATEMENT OF FACTS.

The complaint alleges that the collector did "unlawfully prevent the plaintiff from importing into the United States 226 packages of country green teas;" that the teas were found inferior in quality to the standards prescribed by law; that the collector "thereupon refused to permit the plaintiff to withdraw the said teas from the control of the defendant for consumption in this country, and prohibited and prevented the plaintiff from taking any other action with regard to said teas except to export them from the United States;" that the plaintiff offered to pay the duties on the teas; that the teas were wholesome, etc., and "superior to any valid standard fixed and established pursuant to any valid statute," etc.; and that "by reason of the wrongful acts of the defendant, above set forth, plaintiff has been subjected to various expenses and has been compelled to export and sell the same under great loss" (pp. 3–5).

The other causes of action are similar.

The evidence as to the quality of the teas is substantially the same as in the Stranahan case. The difference between the cases is in the steps taken after the ruling of the Board of General Appraisers.

The board having found the teas below standard in each instance, defendant or his deputy thereupon sent plaintiff a polite letter upon a form shown at page 30 of the record. The entire letter is as follows:

SIR: In accordance with the provisions of section 8 of the act of March 2, 1897, I transmit herewith two copies of the findings of the Board of General Appraisers on the tea covered by your invoices Nos. 9677 and 9680, covered by entry No. 8016.

G. R. BIDWELL, *Collector*.

Sending this letter seems to be the overt offense of the defendant.

It is not claimed that any attempt was made to force him into the position of converting the teas to his own use or committing a trespass upon them. They were in a bonded warehouse (p. 31). Plaintiff withdrew them and exported them from the country (p. 35):

> Q. On the receipt of these notices you wrote these two letters of protest, Exhibits 16 and 17, and either exported the goods out of the country or else sold them to somebody else to export out of the country?—A. That is correct.
>
> Q. Won't you explain the reasons why you did that; you mean that having read the law and the regulations, and taken advice on them, you concluded that was the only thing practical for you to do?—A. We knew from experience that was the only practicable thing to do.

The letters (Exhibits 16 and 17) to which plaintiff thus refers were on the same form, were directed to the defendant in his individual capacity,

and (after enumerating the invoices referred to) were as follows (pp. 32–34):

> We protest against your refusing to admit for consumption in this country the teas in question, on the ground that your action in so doing is illegal. We hereby notify you that we shall hold you personally liable for all damages that may be caused by said illegal acts on your part.

Plaintiff assumed without further inquiry that the law (although claimed by himself to be invalid) would have been respected by the collector. On the trial he relied on testimony of custom-house clerks that the "course of business at the custom-house" was to administer the law according to its terms and the Treasury Regulations thereunder (pp. 17, 19, 20).

The special question in this case is whether these facts are sufficient foundation for an action of tort against an officer of the Government.

ARGUMENT.

I. Plaintiff never had at any moment the right to possession of these teas except for the purpose of exporting them. He never paid or tendered the war duty, which was then in force. (Repealed by act of April 12, 1902, c. 500, § 10.) They were therefore detainable in bonded warehouse upon grounds altogether independent of the act of 1897.

II. The right of possession which he had he demanded and received. He exported the teas and sold them, and has the proceeds of their sale.

III. Assuming the act of 1897 to be unconstitutional, defendant did nothing to harm the plaintiff. It was certainly a proper civility to inclose him two copies of the Board of Appraisers' report.

Nor did he omit to do anything that he should have done for the plaintiff. He was never asked to release the teas, except for export.

"Mere omission or nonfeasance" is not a conversion (1 Chitty on Pleading, 174); and in the absence of any wrongful act or omission we respectfully submit that no action of tort—not even one of "trespass on the case," as plaintiff terms this one—is maintainable.

IV. Plaintiff's letters of protest are documents of no legal value. The collector could hardly have done anything with them except indorse them "File." They contained nothing for him to act upon, and were not even addressed to him in his official capacity.

V. The theory of this action seems to be that the act of 1897, while invalid, was being treated as valid by the Treasury Department, and therefore that if the duties had been tendered and the release of the teas for consumption requested defendant would have refused the tender and request.

In other words, because there were Treasury regulations outstanding which plaintiff claims to have been illegal, and because these regulations had been enforced against others, he claims that

he was excused from the necessity of making a demand for his own goods in order to put defendant into the position of a tortfeasor.

But A can not sue B in tort on the mere allegation that B has wronged C, D, and E, and by his thus established "course of business" would have wronged A if he had had the opportunity.

And if plaintiff is right in his main contention, the statute upon which the regulations were based was non-existent. An unconstitutional statute is void for all purposes (*Norton* v. *Shelby County*, 118 U. S., 425; *Huntington* v. *Worthen*, 120 U. S., 97). Hence the regulations were a nullity, and there is no presumption that defendant would have enforced them.

The forms of common law actions were changed by the code procedure, but the underlying principles survive. The Code has not given an action where no wrong was previously recognized as existent (Fiero on Law and Practice in Actions for Torts in the State of New York, 1903, p. 12). The requirement of demand and refusal is universally recognized (Cooley on Torts, 452; *Lewis* v. *Mott*, 36 N. Y., 395, 401–2; *Goodwin* v. *Wertheimer*, 99 N. Y., 149, 153).

We have been unable to find any authority excusing demand and refusal in case defendant has done no overt illegal act and plaintiff desires to bring an action of tort. One of the two cases cited by plaintiff is in ejectment and the other a proceeding in the Court of Claims.

VI. The other questions involved are discussed in our brief in No. 296 (*Buttfield* v. *Stranahan*).

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
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HENRY M. HOYT,
Solicitor-General.

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